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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Fred W. Burdette, Sr. prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled case on June 16, 1969.

CITATIONS TO OPINIONS BELOW

The order of the Circuit Court of Sumner County, Tennessee, is unreported and is printed in Appendix A hereto, *infra*, p. 20. The opinion of the Criminal Court of Appeals for the State of Tennessee, unreported at the date this

petition is being filed, is printed in Appendix B hereto, *infra*, p. 22. The orders of the Supreme Court of Tennessee denying petitions for a writ of certiorari and a rehearing of the petition are unreported, and contained in the record, R. 116, 118.

JURISDICTION

The judgment of the Criminal Court of Appeals for the State of Tennessee was entered on December 13, 1968. The petitioner's timely filed Petition for Writ of Certiorari was denied by the Supreme Court of Tennessee on April 21, 1969 and a Petition to Rehear Petition for Certiorari was denied by the Supreme Court of Tennessee on June 16, 1969. The time within which to file a Petition for Writ of Certiorari in this Court was extended from September 15, 1969 to October 15, 1969 in an order issued by the Honorable Potter Stewart on September 10, 1969, further extended from October 15, 1969 to October 27, 1969 in an order issued by the Honorable Potter Stewart on October 9, 1969 and again extended from October 27, 1969 to November 1, 1969 in an order issued by the Honorable Potter Stewart on October 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

In the proceedings below petitioner and his son were jointly charged in a two-count indictment with assault with intent to commit rape and assault with intent to commit murder. The prosecution agreed to permit the son to plead guilty to the second count and receive a stipulated punishment if, and only if, petitioner whose involvement in the alleged criminal activities was peripheral, would also plead guilty to an attempt to commit a felony, a charge which requires specific criminal intent under Tennessee law. The question presented is:

> Whether under the circumstances described above, the trial judge's acceptance of petitioner's guilty plea without first determining affirmatively on the record that it had been made intelligently and voluntarily was an unconstitutional deprivation of petitioner's privilege against self-incrimination.

STATUTE INVOLVED

The statute involved in this case, Tennessee Code Annotated, § 40-2310 (1968 cumulative supplement 209), is contained in Appendix A hereto.

STATEMENT

On August 25, 1967, petitioner, his son Fred W. Burdette, Jr., and one Joe Crawford, were jointly indicted by the Grand Jury for the Circuit Court of Sumner County, Tennessee, in a two-count indictment charging each of them under Tennessee Code Annotated Sections 39-605 and 39-604, with assault and battery with intent to have carnal knowledge of one Faye Jarrell Esposito and assault with the intent to murder the same Mrs. Esposito. (R. 4)[1] Conviction under each of the charges is punishable by a sentence of not less than 10 nor more than 21 years in the penitentiary.

The case was called for trial on January 15, 1968, at which time Crawford was granted a severance. A jury was duly empaneled and sworn. The trial judge, out of the presence of the jury, then proceeded to question the prosecutor concerning an agreed upon disposition of the charges against petitioner and his son whereby petitioner was to plead guilty to attempt to commit a felony (Tenn. Code Ann. § 39-603) and his son was to plead guilty to assault and battery with intent to commit murder in the first degree as charged in the second count of the indictment. The agreement also called for a recommendation of punish-

[1] The record of the proceedings below are cited herein as "R. ___." Due to an apparent inadvertance by counsel or a clerk in one of the courts below, the transcript of an oral argument held before the trial court on petitioner's "Motion for New Trial" was not a part of the record certified to the Supreme Court of Tennessee. However the transcript was quoted in briefs to the Court and was relied upon by petitioner below. The transcript as attested to by the court reporter and counsel for petitioner is being submitted to this court as a part of the record, and is cited herein as "Arg. ___."

ment on the part of the prosecutor whereby petitioner would receive a sentence of 11 months and 29 days in jail and his son would receive a ten-year sentence in the State Penitentiary. (R. 27-28, 36)

Under Tennessee law, Tennessee Code Annotated Section 40-2310, the recommendation for disposition and punishment must be submitted to and accepted by a jury before judgment can be rendered on the plea.[2] In compliance with this provision, the prosecutor related a summary of the facts in the case to the jury.

The prosecutor's statement indicated that Mrs. Esposito, the complainant, had worked on a part-time basis as a clerk-typist for petitioner and his son in their business of arranging musical shows for police and fire department benefits. On the afternoon of July 21, 1967, petitioner drove Mrs. Esposito from her home to the home of petitioner's son where she was to work. After explaining the nature of the work to be done, petitioner left, leaving Mrs. Esposito and petitioner's son together. Mrs. Esposito immediately noticed that the son, Burdette, Jr., had been drinking. Shortly after petitioner had left, his son asked Mrs. Esposito for a match and she "pitched him the matches". This act angered Burdette, Jr., and he drew a pistol and forced her to light his cigarette. Thereafter, with the pistol still drawn, Burdette, Jr. forced Mrs. Esposito into the bedroom of the house where he forced her to disrobe and get into a bed. However, he did not disrobe himself and made no attempt to sexually assault her. (R. 29-30)

The prosecutor further told the jury that during the course of these events "a colored man [Joe Crawford] who was working there in the garden at that time, came into the house and witnessed what took place." Burdette, Jr. told

[2] See Appendix A.

Crawford, who was unarmed, to tell Mrs. Esposito to follow orders or "he [Burdette, Jr.] would kill her." Crawford apparently left after a short period of time. (See R. 32) Burdette, Jr. continued to drink wine and whiskey while Mrs. Esposito was undressed. Mrs. Esposito was permitted to put her clothes back on. Although Burdette, Jr. made no physical attempt to sexually assault her he threatened such assault and "slapped her around considerable." Later, petitioner came back to the house and Mrs. Esposito begged him to help her. He responded that he couldn't help her, that he was afraid his son would shoot him. Burdette, Jr. decided that he needed to go to the bathroom and, after unsucessfully insisting that Mrs. Esposito accompany him, he gave the gun to petitioner who held the gun on Mrs. Esposito while his son was out of the room. Mrs. Esposito begged petitioner to let her get away while the son was out of the room, but petitioner refused saying someone might get hurt if they did not do what Burdette, Jr. ordered. Burdette, Jr. returned from the bathroom and shortly thereafter petitioner again left the house. Mrs. Esposito then escaped from Burdette, Jr. and ran out of the house. (R. 30-33)

With regard to the part played by petitioner in the events of July 21, 1967, the prosecutor told the jury:

> "I can't say from the facts and Mrs. Esposito hasn't indicated that she knows whether or not he would have actually killed her on that occasion when he had the gun. It was pointed in her direction. But she must have believed something that he might have done or she would have run at that time. So I think there is some reason to believe that he had a responsibility in this matter. I take no pleasure, and I'm sure no jury would, to send a man of his age to a common jail for eleven months and twenty-nine days, but I think it is a merciful sentence that I'm recommending under the circumstances." (R. 36)

After the prosecutor had completed his statement to the jury, the trial judge called petitioner, his son and their

counsel before the bench and, in open court before the jury, the following was said:

THE COURT: Now, Judge Durham [defense counsel] you represent these two defendants?

MR. DURHAM: Yes, Your Honor.

THE COURT: You have been employed by them to represent them, you were not appointed. Is that correct?

MR. DURHAM: That is correct.

THE COURT: Now do you agree that the resume of the facts which the Attorney-General has stated here would be substantially the testimony of the State?

MR. DURHAM: Substantially that would have been the testimony of their witnesses, Your Honor.

THE COURT: All right. Now, Mr. Fred Burdette, Jr., do you plead guilty to felonious assault with intent to commit murder in the first degree?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: You do?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: Mr. Burdette, Sr., do you plead guilty to an attempt to commit a felony?

MR. BURDETTE, SR.: Yes, sir.

THE COURT: Now, you gentlemen understand what you are doing? Your rights have been told to you by your attorney?

MR. BURDETTE, JR.: Yes, sir.

MR. BURDETTE, SR.: Yes, sir.

THE COURT: And you realize that you are pleading guilty?

MR. BURDETTE, SR.: Yes, sir.

THE COURT: Do you, Mr. Burdette, Jr.?

MR. BURDETTE, JR.: Yes, sir.

THE COURT: And you are doing it voluntarily?

MR. BURDETTE, SR.: Yes, sir.

MR. BURDETTE, JR.: Yes, sir.

THE COURT: All right. Have they signed the plea of guilty and the waiver of appeal?

MR. DURHAM: Yes, Your Honor. I have the waiver of appeal signed by them and by myself. (R. 37-38)

The "Plea of Guilty" signed by petitioner and his attorney reads as follows:

> "The defendant, appearing in person in this case, and having been fully advised by the Court of the crime charged against him, the punishment which could be meted out if the defendant is found guilty and of his constitutional rights therein hereby voluntarily pleads guilty to the offense of Attempt to Commit a Felony.
>
> "The defendant also states to the Court that his attorney being present, Honorable William Fred Durham has fully informed him of all of his rights and that after a full explanation of these rights, the defendant informed his attorney that he wanted to voluntarily enter a plea of guilty, and to this decision of the defendant, said attorney agrees." (R. 12)

Petitioner and his attorney also executed a "Waiver of Appeal" indicating that petitioner's decision to waive rights of appeal had been made "voluntarily after a full and complete discussion of same with his attorney." This document contained the statement that "his attorney agrees that defendant has no basis for appeal as there are no errors in the record." (R. 14)

On March 14, 1968, petitioner, by and through new counsel, filed a "Motion for New Trial" in the trial court, requesting the court to set aside the verdict of guilty and grant him a new trial on the grounds that the evidence did

not support the verdict and that he had "entered a plea of guilty in order to obtain a smaller sentence for his son, notwithstanding the fact that he was not guilty of any intentional wrong-doing." Evidentiary support for the motion was supplied by a certified copy of a transcript of the preliminary hearing held in the case on July 24, 1967 which was "made an exhibit to [the] motion by reference." (R. 15-16)

The prosecutor's statement to the jury did not differ from the testimony given at the preliminary hearing in any way material to the questions presented herein. However, the following excerpts from the testimony given at the preliminary hearing are pertinent to an understanding of the circumstances of petitioner's involvement in the alleged criminal acts and, consequently, his knowledge of the elements of the crime to which he plead guilty:

Mrs. Esposito testified that:

> Burdette, Jr. told her that "instead of killing me he was going to shoot me in the knees and watch me bleed to death." (R. 60)
>
> Burdette, Jr. spoke to petitioner over the telephone and said "if he came back over there he was going to blow his brains out." (R. 64)
>
> Burdette, Jr. "was drinking whiskey and he drank beer. I know that he was crazy. His eyes . . . He didn't know what he was doing and he couldn't walk straight." (R. 90)
>
> She "kept thinking that maybe he would just pass out in a minute from drinking so much whiskey." (R. 63)

The deputy sheriff who arrested Burdette, Jr. about two hours after Mrs. Esposito had escaped testified that:

> Burdette, Jr. was "in a drunken or drugged condition." (R. 102)
>
> At the scene of the arrest he ordered Burdette, Jr. out of an automobile and Burdette, Jr. refused saying "get away or I'll shoot you." (R. 100)

> When Burdette, Jr. got out of the car, instead of obeying the deputy's orders to raise his hands, "he started towards his pocket instead of raising them." Burdette, Jr. jerked his hand away from the deputy when threatened, but still refused to raise his hands and when the deputy "got about three feet from him he started for the pocket again" and the deputy had to forcibly disarm him. (R. 100)

With regard to the petitioner's reaction to his son's behavior, Mrs. Esposito testified that:

> "When I heard him using the bathroom I begged [petitioner] to let me out and he wouldn't do it. He said 'No if I let you out he will kill me' Everything that Fred, Jr. said his father backed him up as if he was scared of him or something." (R. 78)

> Petitioner told Mrs. Esposito that if he let her go, his son would "kill you and if I let you go he will kill me." (R. 91)

During the course of the oral argument on petitioner's Motion for a New Trial, the trial judge, in responding to an assertion by petitioner's counsel that petitioner's guilty plea had been agreed to in an effort to save his son from a possible 21-year prison sentence, asked the prosecutor:

> "No[w], General, to refresh my memory and I may be incorrect in this. Wasn't the Burdette, Jr. sentence agreed to before it was ever agreed to let Mr. Burdette, Sr. plead guilty to an attempt to commit a felony?" (Arg. 11)

The prosecutor responded by stating:

> "Your Honor, this is outside the record. I would have to say that the plea of guilty in both cases, *and this is in some support of the motion that has been made,* that they were part and parcel of the same agreement. I would have to say that, that we did not accept the plea of guilty of Burdette, Jr. without the plea of guilty of Burdette, Sr., so they were both presented." (Arg. 11-12; emphasis added.)

The trial court entered a written order on March 1, 1968 denying petitioner's Motion for a New Trial. (Appendix B hereto, p. 20.)

On March 27, 1969, petitioner filed a Petition for Certiorari and Supersedeas in the Criminal Court of Appeals for the State of Tennessee, alleging *inter alia* that

> "petitioner, out of distress and concern for his son, entered a plea of guilty to prevent his son from receiving a more severe sentence, which he was compelled to do. This plea was not in truth and fact of his own free will and accord, or that he was guilty of any offense."

The petition was granted March 27, 1969 and the writs of certiorari and supersedeas were issued

As a part of his attack on the judgment of the trial court, petitioner also filed a motion in the appellate court requesting permission to file a certified copy of the preliminary hearing transcript. In a decision, released December 13, 1968, the Tennessee Criminal Court of Appeals affirmed the trial court's denial of petitioner's Motion for New Trial, and denied his motion to have the preliminary hearing transcript made a part of the record, holding that since the transcript "was not an exhibit below and is not a part of the bill of exceptions, we cannot consider it." The Court then weighed the only "evidence" in the case, the prosecutor's statement to the jury, and stated that "[t]he assignments saying there is no evidence to support the verdict of guilty and that the evidence preponderates against it are overruled." (Appendix B hereto, p. 24.)

In disposing of petitioner's other points, the Court stated:

> "By assignments of error the defendant contends that he was forced at gun point to aid and abet his son, that he only pretended not to help the victim in order to save his life as well as hers and to prevent a tragedy, that his guilty plea was made only to obtain a smaller sentence for his son, and the evidence at the preliminary hearing shows that the defendant had no intent to harm the victim and

> was helpless to assist her. *These allegations are not sustained by the evidence stipulated and presented to the Court and jury.* The assignments based on them must be overruled." (Appendix B hereto, p. 24; emphasis added.)

On March 12, 1969, petitioner filed a "Petition for a Writ of Certiorari and Supersedeas, Assignment of Errors and Brief" in the Supreme Court of Tennessee, arguing, *inter alia,* that:

> "From a review of the transcript of the proceedings at the preliminary hearing, it is apparent that petitioner has committed no indictable offense. That the grounds contained in his motion for a new trial are fully sustained by the record. That his plea of guilty was in fact forced upon him for the compelling reason to effectuate a smaller sentence for his son."

The Supreme Court of Tennessee issued an order, without opinion, on April 21, 1969, denying certiorari. (R. 116) Thereupon petitioner, on May 13, 1969, filed a "Petition to Rehear Petition for Certiorari" alleging that his plea had not been freely and voluntarily made but had been entered into in an effort to protect his son whose plea and agreed upon punishment would not have been accepted by the prosecutor if petitioner had refused to plead guilty and had exercised his rights to a trial. In urging the Supreme Court to reverse the decisions of the lower courts, petitioner argued that:

> "the action of the honorable trial judge in failing to immediately void the conviction of your petitioner and grant him a new trial on his motion was error in view of the authorities which control pleas of guilty, said authorities being both from the United States Supreme Court and this Honorable Supreme Court."

In his "Brief of Law in Support of Petition", petitioner cited and briefly discussed this Court's decisions in *Kercheval v. United States,* 274 U.S. 220 (1927) and *Machibroda*

v. United States, 386 U.S. 487 (1962), both of which treat the question of the acceptance and withdrawal of guilty pleas.

The Supreme Court of Tennessee denied petitioner's "Petition to Rehear Petition for Certiorari" in an order, without opinion, issued on June 16, 1969. (R. 118)

REASONS FOR GRANTING THE WRIT

1. The procedures employed by the trial court conflict with the requirements set forth by this Court in *Boykin v. Alabama,* 395 U.S. 238, decided June 2, 1969. Although the trial court below and the Tennessee Court of Criminal Appeals decided this case prior to the issuance of this Court's decision in *Boykin v. Alabama,* the Supreme Court of Tennessee's refusal, in an order released two weeks *after* the issuance of the *Boykin* decision, to even examine the instant case through the issuance of a writ of certiorari indicates that there is a need for this Court to reiterate its holding in *Boykin.*

In *Boykin* a guilty plea was accepted by the trial judge without addressing any questions to the defendant. This Court held that

> "it was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242.

A guilty plea involves the waiver of several constitutional rights and the requirements for passing on the constitutionality of such waivers are governed by federal standards. *Boykin v. Alabama, supra,* at 243, citing *Douglas v. Alabama,* 380 U.S. 415, 422 (1965). The *Boykin* opinion quotes with approval from the decision in *McCarthy v. United States,* 394 U.S. 459 (1969) as follows:

> ". . . For this waiver to be valid under the Due Process Clause, it must be an 'intentional relinquishment or abandonment of a known right or privilege'." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (395 U.S. at 243, footnote 5.)

Although this Court, in *Boykin,* did not expressly adopt the specific standards of Rule 11 of the Federal Rules of Criminal Procedure to govern the acceptance of guilty pleas in state courts, it did hold that waiver of such constitutional rights

> "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. When the judge discharges that function, he leaves a record adequate for the review that may be later sought." (395 U.S. 243-244.)

The record[3] below, while not silent as was the case in *Boykin,* is cursory and superficial and obviously does not reflect the "utmost solicitude" of the trial court in canvassing the matter of the plea with petitioner. Nor is the record adequate for a reviewing court to determine that the plea was "intelligent and voluntary."[4] Thus, the only questions propounded to petitioner by the trial court were:

> "Now, you gentlemen understand what you are doing? Your rights have been told to you by your attorney?

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[3]R. 37-38, printed in full in the Statement, *supra,* at pp. 6-7.

[4]*Boykin, supra,* 395 U.S. at 242.

"And you realize that you are pleading guilty?

"And you are doing it voluntarily?"

To each question propounded, petitioner answered: "Yes, sir." (R. 38)

The written "Plea of Guilty"[5], although containing conclusionary language, indicating petitioner had been "fully advised by the Court of the crime charged against him, the punishment which could be meted out . . . and of his constitutional rights" and that his attorney had "fully informed him of all his rights", lacks the type of specificity necessary to indicate the true knowledge which is required on the part of a defendant before this Court will approve a waiver of a constitutional right. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948.) As the Court indicated in *McCarthy v. United States, supra*, "[T]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (394 U.S. at 470, emphasis in original.) The Supreme Court of Iowa has recently reversed a trial court's acceptance of a guilty plea in a similar case and in doing so has construed *Boykin* and other decisions of this Court to require that

> "when a guilty plea is entered by a defendant, the Court must address the accused personally and by that procedure heretofore described determine whether he understands the charge made, is aware of the penal consequences of the plea and that it is entered voluntarily. Nothing less will suffice. *State v. Sisco*, 169 N.W.2d 542, 549 (S. Ct. Iowa, released July 24, 1969) (opinion of a minority of the Court). See also *ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty*, § 1.4, Approved Draft 1968.

Thus, the disposition of this case by the Supreme Court of Tennessee is clearly in conflict with decisions of this Court and the decision of at least one state Supreme Court. For

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[5]R. 12.

these reasons a writ of certiorari should issue so that the Court may consider the conflict and issue a clarifying opinion indicating that "a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver," *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), no more satisfies the requirements for a valid waiver of constitutional rights than did the silent record in *Boykin v. Alabama*.

2. As the foregoing discussion indicates, the decision below is clearly erroneous and this Court should grant this petition to correct the injustice rendered to petitioner. In many cases, the injustice worked by a trial court's failure to employ procedures such as those set forth by *Boykin v. Alabama, supra*, are not evident on the record. The entering of a guilty plea is obviously a special situation where the defendant and his lawyer want the plea to be accepted and will remain silent even if possible constitutional problems are apparent. As the Court stated in *Boykin*, "[I]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243.

However, in the instant case, even though the trial judge did not have the benefit of the requirements so explicitly stated by this Court in *Boykin* to guide him, he should have been on notice of the possibility that ignorance and coercion might have effected petitioner's decision to enter a plea, and should have taken some steps beyond the perfunctory questioning indicated by the record to guard against such occurrence.

Thus, where a father and son are jointly charged with a serious crime which was admittedly committed by the son and the father was involved only peripherally, the Court should have been alert to the possibility of the prosecution demanding the father's plea in return for a promise of leniency in the punishment of the son. The coercion inherent in such a situation is obvious and at the argument on petitioner's Motion for a New Trial, the prosecutor readily ad-

mitted that the plea and agreement as to punishment for petitioner's son were accepted only after petitioner had agreed to enter a guilty plea. (Arg. 11-12).

Similarly, where the facts related to the jury indicated that at the time the assault took place petitioner may have been acting out of fear of his son, rather than his own free will,[6] the trial judge should have been alerted to the possibility that petitioner did not understand the doctrine of "specific intent" as it applied to his actions in this case. Since the crime to which petitioner pleaded guilty—attempt to commit a felony (Tenn. Code Ann. § 39-603)—includes the element of specific intent under Tennessee law, *Gervin v. State*, 212 Tenn. 653, 657, 371 S.W. 2d 449 (1963), petitioner could not have intelligently pleaded guilty without an explanation of the doctrine. See *McCarthy v. United States, supra*, 349 U.S. at 470-471. The record below does not contain any indication whatsoever that the petitioner possessed the "understanding of the law in relation to the facts" which is necessary before a waiver of his constitutional rights can be adjudged valid. *McCarthy v. United States, supra* at 466.

Thus, the instant record presents a more compelling showing of an abuse of substantive rights than the mere silent record of *Boykin*. It contains the possibility of a plea to a charge that the defendant did not understand—as was the case in *McCarthy, supra*—and the possibility that the plea was the result of a "plea-bargain" which was inherently coercive. Under the circumstances, this petition should be granted for the purpose of correcting the error of the Tennessee appellate courts, and if the Court believes that full briefing and oral argument are unnecessary due to the decision in *Boykin*, the decision of the Tennessee Court of Criminal Appeals should be summarily reversed and the judgment below vacated.

3. The record below presents this Court with the opportunity to rule on an important aspect of the administration of justice in the criminal trial courts. As the Court acknowl-

[6] See R. 31.

edged in *McCarthy v. United States, supra,* approximately 86% of all convictions obtained in U.S. District Courts during 1968 were obtained pursuant to a plea of guilty. 394 U.S. at 459, footnote 7. The ABA's Project on Minimum Standards of Criminal Justice has indicated that in some jurisdictions, 95% of the criminal cases are disposed of through guilty pleas and a "substantial number of these pleas are the result of prior dealings between the prosecutor and the defendant." *Standards Relating to Pleas of Guilty,* Approved Draft 1968, 1, 60. As the record below graphically demonstrates, the processes of so-called "plea-bargaining" are open to abuse. As stated by the ABA's study group:

> "Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him. Notwithstanding the fact that the plea has been the subject of negotiation, the defendant usually answers in the negative and the prosecutor and defense counsel seldom indicate to the contrary * * * As a result the negotiation process remains largely invisible, informal, and not subject to any systematic control." *Standards Relating to Pleas of Guilty,* Approved Draft 1968, 61.

This Court has stated that a "guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void". *Machibroda v. United States,* 368 U.S. 491, 494 (1962). However, the Court has never closely examined and ruled on the constitutionality of "plea-bargaining" and the procedural safeguards which, if followed, might permit a valid waiver of constitutional rights when a defendant pleads guilty as part of an agreement with the prosecution. As the ABA Project points out, there is considerable uncertainty about the legal status of "plea-bargaining" due to the case of *Shelton v. United States,* in which the United States Court of Appeals for the Fifth Circuit first vacated a sentence on the grounds that it was received as a result of an inducement to plead guilty, 242 F.2d 101 (1957) and then reversed itself on rehearing, hold-

ing the plea was voluntary. 246 F.2d 571 (1957). On petition for writ of certiorari to this Court, the Solicitor General confessed error, and in a memorandum decision without opinion, the Court granted the petition and reversed the Fifth Circuit's holding that the plea was voluntary. 356 U.S. 26 (1958). See also, Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas,* 112 U. Pa. L. Rev. 865, 871-873 (1964).

Since during the last term, in *McCarthy* and *Boykin,* the Court announced new procedures to be followed in protecting the constitutional rights of defendants who plead guilty, this would appear to be an appropriate time to consider and rule upon the procedures to be adopted to protect defendants who have entered pleas of guilty in reliance upon an agreement with the prosecution. The record below which indicates that even though the trial judge knew petitioner's plea to be the product of a potentially coercive bargaining situation, he failed to inquire into the circumstances surrounding the agreement, affords this Court a good vehicle for deciding the important unanswered questions concerning "plea-bargaining."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted

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October 27, 1969

APPENDIX A

STATUTE INVOLVED

Tennessee Code Annotated, Section 40-2310 (1968 Cumulative Supplement 209), reads as follows:

> "Fixing Penalty on Plea of Guilty - Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be impaneled to hear the evidence and fix the time of confinement, unless otherwise expressly provided by this Code. Provided, however, that if the defense does not request a trial on this plea of guilty, and has agreed to accept the punishment recommended in the case on the plea of guilty, in the discretion of the court a resumé of the facts of the case shall be related to the jury by the state and stipulated and agreed to by the state and the defense as being the substantial facts and evidence in the case to be considered by the jury as such facts and evidence, and the jury may then approve the recommendation and be sworn to fix the punishment. In such pleas of guilty by stipulation and agreement, the judge shall not be required to change the jury in writing or otherwise."

APPENDIX B

ORDER AND OPINION BELOW

MINUTES CIRCUIT COURT SUMNER COUNTY, TENNESSEE, FEBRUARY TERM, 1968 MINUTES FOR MARCH 1, 1968

COURT OPENED PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE THOMAS BOYERS, III, JUDGE WHEN THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF RECORD, TO-WIT:

MINUTE BOOK 57 - PAGE ____

STATE OF TENNESSEE
VS: # 303
FRED BURDETTE, SR.

ORDER

This cause came on to be heard on the 1st day of March, 1968, before the Honorable Thomas Boyers, III, Judge of the Circuit Court of Sumner County, Tennessee, on motion of the defendant Fred Burdette, Sr., for a new trial. Upon argument of counsel and presentation of written motion to the Court, which motion the Court denied, including the request of the defendant to be permitted to file the transcript of the proceedings had at the preliminary hearing.

And it further appearing to the Court that counsel for the defense requested of the Court that they be allowed to appeal this cause, the Court denies defendant and counsel the right to appeal, on the grounds that the defendant executed a valid and voluntary waiver of a motion for new trial and an appeal which is a part of this record.

Whereupon exceptions were taken by defense counsel, both to the Court's ruling concerning the Motion for New Trial and to the Court's denial of defendant's right to appeal.

The Court after denying the Motion and the right to appeal, does hereby Order the defendant, Fred Burdette, Sr., to report to the Sheriff of Sumner County, Tennessee, on March 29, 1968, to be incarcerated in jail and to serve the sentence heretofore imposed in this cause. However, the defendant may remain on bond until that time.

Thereupon Court was adjourned.

/s/ Thomas Boyers, III
JUDGE

APPROVED:

/s/ Joe P. Binkley
/s/ Howard F. Butler
ATTORNEYS FOR DEFENDANT

THEREUPON COURT ADJOURNED UNTIL MARCH 4, 1968 AT 9:00 A.M.

/s/ Thomas Boyers, III
JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

MAY 1968

APPEAL IN ERROR
FROM THE CIRCUIT COURT OF SUMNER COUNTY
HONORABLE THOMAS BOYERS, III, JUDGE

FRED BURDETTE, SR., Plaintiff in Error,	)	
v.	)	SUMNER CRIMINAL
STATE OF TENNESSEE, Defendant in Error.	)	

For The Plaintiff In Error:

Howard F. Butler
Joe P. Binkley
Nashville, Tennessee

For The Defendant In Error:

George F. McCanless
Attorney General
Nashville, Tennessee

Albert D. Noe, IV
Assistant Attorney General
Nashville, Tennessee

James M. Porter
District Attorney General
Springfield, Tennessee

JUDGMENT AFFIRMED
OPINION BY JUDGE MARK A. WALKER
FILED: December 13, 1968

OPINION

Fred Burdette, Sr., the defendant below, was jointly indicted with his son, Fred Burdette, Jr., and Joe Crawford in a two-count indictment charging them, in one count, with assault and battery upon Faye Jarrell Esposito with intent to have unlawful carnal knowledge of her and, in the other count, with assault upon her with intent to commit murder in the first degree.

A severance was granted as to Crawford. On January 15, 1968, the defendant, represented by retained counsel, en-

tered a plea of guilty to an attempt to commit a felony. At the same time, his son, represented by the same counsel, pled guilty to assault with intent to commit murder in the first degree. The defendant executed a written plea of guilty and a waiver of appeal.

The District Attorney General explained the facts of the case to the jury and the defendant's attorney agreed that the testimony of witnesses would have been substantially the same. The Court specifically inquired of the defendant about the voluntariness of his plea of guilty; the defendant answered that he understood he was pleading guilty and that his plea was voluntary. To a question by the Court his counsel replied that the defendant had signed the plea of guilty and waiver of appeal. The District Attorney General had told the jury of the recommendation that the punishment of the defendant be fixed at eleven months and twenty-nine days in jail and, for Burdette, Jr., a maximum of ten years in the penitentiary. After the Court explained the recommendation, the jury retired and returned, making their verdict in accordance with the recommendation as to each. The trial judge thereupon sentenced the defendant and his codefendant.

On February 14, 1968, the defendant, represented by different counsel, filed a motion for a new trial, which was overruled March 1, 1968. The trial court declined to permit the defendant to file a transcript of the proceedings at the preliminary hearing. The defendant undertook to pray an appeal, but the trial judge denied it on the ground that he had executed a valid and voluntary waiver of a motion for a new trial and an appeal. A member of this court granted certiorari and supersedeas and the matter is now before us.

The defendant has filed a motion in this court seeking to file a transcript of the record of the preliminary hearing certified by the general sessions judge. We know of no authority for filing such a record here, and this motion is denied. He also assigns as error the refusal of the trial judge

to permit him to make this transcript an exhibit to his motion for a new trial. The record of the preliminary hearing was not a part of the trial below, and was not used to impeach any witness. We do not think the trial judge erred in declining to permit it to be made an exhibit. Since it was not an exhibit below and is not a part of the bill of exceptions, we cannot consider it.

The statement of the District Attorney General, which was not controverted, showed that Burdette, Jr., who had been drinking, held a pistol on the prosecutrix and made her disrobe but then let her put her clothes on, that she begged the defendant to help her, but he told her he was afraid his son would shoot him, that Burdette, Jr., finally decided that he had to go to the bathroom, but she refused to go there with him; that he gave the pistol to the defendant, who held it on her while Burdette, Jr., went there; when Burdette, Jr., was in the bathroom she begged the defendant to let her get away since he had the weapon; that the defendant refused and replied that she had better do what his son said, and no one would get hurt.

We think that this resumé of the facts related to the jury and stipulated and agreed as being the substantial facts and evidence in the case meets the requirements of T.C.A. 40-2310 for fixing the penalty on a plea of guilty. The assignments saying there is no evidence to support the verdict of guilty and that the evidence preponderates against it are overruled.

By assignments of error the defendant contends that he was forced at gunpoint to aid and abet his son, that he only pretended not to help the victim in order to save his life as well as hers and to prevent a tragedy, that his guilty plea was made only to obtain a smaller sentence for his son, and the evidence at the preliminary hearing shows that the defendant had no intent to harm the victim and was helpless to assist her. These allegations are not sustained by the evidence stipulated and presented to the Court and jury. The assignments based on them must be overruled.

Since certiorari was granted and we have considered the assignments challenging the plea of guilty and the evidence in the case, we do not find it necessary to consider the assignment that the trial judge erred in refusing to grant an appeal.

The judgment of the trial court is affirmed.

Judge Galbreath did not participate in this case.

/s/ Mark A. Walker
Presiding Judge

CONCUR:
/s/ W. Wayne Oliver

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee, entered and filed on December 13, 1968, has not been designated for publication, but a copy of the same may be found as Appendix B on page 22 of the Petition. The orders of the Supreme Court of Tennessee, which denied certiorari on April 21, 1969, and a petition to rehear the denial of certiorari on June 16, 1969, are unreported but are contained in the record (R. 116, 118).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, the respondent directs attention to the fact that the Petition seeks a writ of certiorari

directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee, as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals. Therefore, the respondent respectfully submits that the Petition seeks the writ of certiorari directed to the improper court.

While the jurisdictional requisites are adequately set forth in the Petition, the respondent denies that the requirements for invoking the jurisdiction of this Court on the question presented by the Petition have been met, as this question has not been properly presented to the courts of Tennessee.

QUESTIONS PRESENTED

The respondent is dissatisfied with the presentation of the question by the Petition and, pursuant to **Rule 40(3)** of the Supreme Court Rules, presents the questions as follows:

I. Did the petitioner properly present to the Tennessee courts the question of whether the petitioner's plea of guilty was accepted without the trial judge first affirmatively determining on the record that such a plea had been made intelligently and voluntarily?

II. Should the rule set forth by this Court in **Boykin v. Alabama**, 395 U. S. 238, decided June 2, 1969, be given retroactive application?

III. Is the examination of the petitioner in open court, while represented by privately retained counsel, a record which fails to disclose that the petitioner voluntarily and understandingly entered his plea of guilty?

STATUTES INVOLVED

Section 39-602 of **Tennessee Code Annotated** provides:

"If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500.00)."

Section 39-604 of **Tennessee Code Annotated** provides:

"Whoever shall feloniously and with malice aforethought assault any person, with the intent to commit murder in the first degree, or shall administer or attempt to give any poison or potion for that purpose, though death shall not ensue, shall, on conviction, be imprisoned in the penitentiary not less than three (3) nor more than twenty-one (21) years."

Section 39-605 of **Tennessee Code Annotated** provides:

"Any person guilty of committing an assault and battery upon any female of the age of twelve (12) years or upwards, with an intent, forcibly and against her will, to have unlawful carnal knowledge of her, shall, on conviction be imprisoned in the penitentiary not less than ten (10) years nor more than twenty-one (21) years."

Section 39-109 of **Tennessee Code Annotated** provides:

"All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

STATEMENT OF THE CASE

On July 21, 1967, Mrs. Faye Jarrell Esposito was taken by the petitioner to his son's house, so she could assist the petitioner and his son in preparing some mail in connection with their business. During the next three to four hours, Mrs. Esposito suffered numerous indignities at the hands of the petitioner's son, Fred W. Burdette, Jr., including being forced to disrobe and lay on a bed beside Burdette, Jr., being slapped and mauled on numerous occasions, and being lewdly propositioned continually. During this entire episode, the petitioner's son was armed with, and threatened the victim with, a loaded pistol.

The petitioner, who had left the house after bringing Mrs. Esposito, returned later while the victim and his son were in the bedroom. The petitioner had brought some whiskey and wine, and told Mrs. Esposito that everything would be all right when she asked the petitioner to help her get home. However, at this time, the petitioner only witnessed his son threaten to kill Mrs. Esposito if she did not drink some beer and wine, but left again before his son forced the victim to disrobe and lay on the bed with him.

After the incident in the bedroom, the victim was allowed to put her clothes back on and called the petitioner at the direction of his son. The petitioner returned, left again to purchase some cigarettes for his son, and returned again with the cigarettes. The petitioner remained this time and again witnessed his son commit various indignities upon Mrs. Esposito. After Mrs. Esposito declined to accompany Burdette, Jr., to the bathroom, the petitioner held the gun on Mrs. Esposito and watched her at the request of his son.

While his son was in the bathroom, the petitioner refused to allow Mrs. Esposito to leave despite her pleas to him for assistance. The petitioner continued to hold the gun on her after his son returned to the room, sat beside Mrs. Esposito on the couch, and proposed different ways for them to have sexual relations. The refusal of Mrs. Esposito to accede to the suggestions of Burdette, Jr., angered him, and he kicked her and told the petitioner to get some rope so he could tie up Mrs. Esposito.

Upon receiving instructions from his son to obtain some rope, the petitioner left the house and did not return. After suffering some more at the hands of Burdette, Jr., Mrs. Esposito eventually made good her escape through a back door of the house, swam fully clothed to a boat dock on the lake behind the house, and was assisted by a man on the boat dock.

On August 25, 1967, the petitioner, his son and Joe Crawford were jointly indicted for assault and battery with intent to have carnal knowledge of Mrs. Esposito and for assault with intent to commit first degree murder of Mrs. Esposito. Joe Crawford, a handyman who worked for the Burdettes and who was present during some of the incidents on July 21, 1967, was granted a severance and was to testify for the State against the Burdettes.

When the case was called for trial on January 15, 1968, the petitioner and his son entered pleas of guilty, after an agreement was negotiated between their retained counsel and the late General Porter. The Trial Court examined the petitioner and his son, with their attorney, in open court before the jury as set forth on pages 6 and 7 of the Petition. After some hesitation, the jury accepted the recommendation of the State, and the petitioner was found guilty of assault with intent to commit a felony and was sen-

tenced to serve eleven (11) months and twenty-nine (29) days in the county jail.

The opinion of the Court of Criminal Appeals of Tennessee correctly details what happened with regard to petitioner's case after his conviction and sentencing, and counsel for the respondent respectfully submits that any further summary of these appellate incidents would be needless repetition.

ARGUMENT

I

The respondent respectfully submits that the issue presented by the Petition has not previously been properly presented to the Tennessee courts. In order to support this contention of respondent, it will be necessary to detail and discuss the issues presented by the petitioner to the Tennessee courts.

The errors assigned and argued on behalf of the petitioner before the Court of Criminal Appeals, the first seven of which were those assigned in the petitioner's Motion for a New Trial, were as follows:

> "I. The evidence preponderates against the judgment of the Court and in favor of the innocence of the defendant.
>
> II. There is no evidence to support the verdict of the jury and the judgment of the Court in this cause.
>
> III. The defendant was an unwilling aider and abettor, if in fact he was an aider and abettor at all, he being forced and coerced at gunpoint to take the action which he took.
>
> IV. The defendant pretended to lend no assistance to the prosecuting witness in order to save his own life and that of the prosecuting witness.
>
> V. Knowing the state of mind of his son at the time, the defendant was placed in a frightening position which required that he act with great caution so as not to alarm his son, who was drunk or crazy at the time, which action on his part did, in fact, prevent a great tragedy, as borne out by the evidence adduced at the preliminary hearing.

VI. The defendant entered a plea of guilty in order to obtain a smaller sentence for his son notwithstanding the fact that he was not guilty of any intentional wrongdoing.

VII. All of the evidence adduced at the preliminary hearing, a copy of which is made an exhibit to this Motion by reference, shows without question that the defendant had no intention of harming the prosecuting witness and was helpless to assist her in the attack on her by his son.

VIII. The Court erred in refusing to permit Burdette, Sr., to make the record of the preliminary an exhibit to his Motion for a New Trial.

IX. The Court erred in refusing to allow Burdette, Sr. to appeal."

These same errors were urged upon the Supreme Court of Tennessee in the petitioner's Petition for a Writ of Certiorari to that court. The first time the petitioner substantially alleged the error now urged upon this court was in his Petition to Rehear Petition for Certiorari, where it was alleged:

"Petitioner would respectfully show to this Honorable Court that he was required to enter a plea of guilty under coercion; that his plea of guilty was not freely and voluntarily made; and further, that this fact was made known to the trial judge, in open Court, by the District Attorney, for the Nineth [sic] Judicial Criminal Court (Sumner County)."

The petitioner recognized that this allegation was being presented for the first time in his Petition to Rehear Petition for Certiorari, as he admitted, *inter alia*, that:

"Petitioner would further state to this Honorable Court that it is admitted that the petition which was first made in his behalf was admittedly void of any

issue which could justify this Honorable Court taking any action other than that of denying his petition, for all of which his attorney accepts full responsibility; however, it is believed, after the aid of additional time, that your petitioner has presented to this Honorable Court an issue, in proper form, sufficient to grant him a hearing, and after presentation of law, the relief to which it is respectfully submitted, he is justly entitled."

The Supreme Court of Tennessee could not, of course, consider this issue, because it had not been raised before by the petitioner in the Trial Court or the Court of Criminal Appeals. **Rules 12, 14 and 15** of the **Tennessee Supreme Court Rules, Vol. 218** of **Tenn. Reports.** In addition, the proposed consideration of this issue by the Supreme Court of Tennessee posed on another problem, since the petitioner relied on evidence which had never been presented to either the Court of Criminal Appeals or the Supreme Court in Tennessee.

In support of this new issue in his Petition to Rehear Petition for Certiorari, the petitioner relied almost exclusively, as indeed he does before this Court, on certain statements of the late General James M. Porter, the District Attorney-General who prosecuted the case for the State of Tennessee. General Porter made these statements during the oral arguments on the petitioner's Motion for a New Trial. The transcript of these arguments, which has been filed with this Court by the petitioner, was never even offered for filing, much less filed, in any court in the State of Tennessee.

Therefore, this issue was not only improperly raised in the Tennessee courts, but the evidence relied upon in support of this issue had not been presented to the Tennessee courts. Because the petitioner failed to properly raise this federal question below and failed to properly present the evidence relied on in support of this issue, the respondent

suggests that this Court lacks jurisdiction to review this issue. **Cardinale v. Louisiana**, 394 U. S. 437 (1969); **N. A. A. C. P. v. Alabama ex rel. Patterson**, 357 U. S. 449, 466-467 (1958); **Michel v. Louisiana**, 350 U. S. 91, 101-102 (1955); **Beauharnais v. Illinois**, 343 U. S. 250, 264-265 (1952). Finally, the respondent submits that this question can be properly presented in the Tennessee courts by use of Tennessee's Post-Conviction Procedure Act. **Section 40-3801 et seq.** of the **Tennessee Code Annotated.**

II

If this Court decides that the issue presented by the Petition was properly presented to the Tennessee courts, then respondent respectfully urges that the rule announced in **Boykin v. Alabama**, 395 U. S. 238, decided June 2, 1969, be given prospective application. As indicated by Mr. Justice Harlan in his dissent from the majority decision in **Boykin**, the effect of the rule announced in **Boykin** upon the several States' criminal procedure is similar to the effect upon federal criminal procedure occasioned by the decision of this Court in **McCarthy v. United States**, 394 U. S. 459 (1969).

The **McCarthy** case was decided on April 2, 1969, and in **Halliday v. United States**, 394 U. S. 831 (1969), this Court declined to apply **McCarthy** retroactively, thus limiting its application to those defendants whose guilty pleas were accepted after April 2, 1969. The respondent respectfully submits that the reasons for limiting **McCarthy** to prospective application are at least as equally significant and persuasively determinative for the same application of **Boykin**. Therefore, the rule announced in **Boykin** on June 2, 1969, would not apply to the acceptance of the petitioner's plea of guilty on January 15, 1968. However, the petitioner could question the voluntariness of his plea through the use of Tennessee's Post-Conviction Procedure Act. **Sections 40-3801 et seq.** of **Tennessee Code Annotated.**

III

If this Court decides that the issue raised by the Petition was properly presented to the Tennessee courts and that **Boykin** is to be applied retroactively, then respondent respectfully submits that the record in the case at bar discloses that the defendant voluntarily and understandingly entered his plea of guilty.

While admitting that the record herein is not silent as in **Boykin**, the petitioner dismisses the examination of the petitioner and his retained counsel as cursory and superficial. The petitioner insists that because of the father-son relationship between the petitioner and his co-defendant and because of the petitioner's questionable guilt, the trial judge should not have relied on the petitioner's mere acceptance of the agreement bargained for and obtained by his attorney. Rather, the petitioner contends that the trial judge should have challenged his attorney's management of the lawsuit by examining the petitioner at length in an effort to insure that he was receiving the effective legal representation for which he was paying. If this is what **Boykin** requires, under what circumstances, if any, may trial judges presume defense attorneys are acting in the best interests of their clients?

In an effort to psychologically strengthen his contention his plea of guilty was not made voluntarily and intelligently, the petitioner suggests his "peripheral" involvement in the events of July 21, 1967, establishing an excellent possibility that he succumbed to the inherently coercive effect of his desire to obtain leniency for his son by acceding to the demands of the prosecution and pleading guilty to a crime for which the evidence would not establish his guilt. While hesitant to argue the effect of the evidence in a criminal case to this Court, respondent feels compelled to take issue with the peti-

tioner's suggestion that he could not be properly found guilty of assault with the intent to commit a felony.

The respondent suggests the lack of merit in the petitioner's contention that he could not be found guilty of assault with the intent to commit a felony is best exposed by an examination of the petitioner's probable success on direct appeal after a complete trial, with the evidence heretofore detailed being presented to a jury, which convicts him of this crime as a lesser included offense under the count of the indictment charging him with assault and battery with the intent to have carnal knowledge. **Strader v. State**, 210 Tenn. 669, 362 S. W. 2d 224 (1962); **Clark v. State**, 214 Tenn. 555, 381 S. W. 2d 898 (1964). In view of the petitioner's assistance of his son, his failure and refusal to use the pistol in his possession to restrain his son instead of Mrs. Esposito and his failure to summon assistance for Mrs. Esposito during any of his absences from the domination and fear producing influence of his son, respondent submits the petitioner would be unable to convince the Court of Criminal Appeals or the Supreme Court of Tennessee to reverse his conviction because of a lack of evidence. In Tennessee, the verdict of the jury, approved by the trial judge, accredits the testimony of witnesses supporting the verdict, resolves all conflicts in favor of the theory of the State, displaces the presumption of innocence and raises a presumption of guilt, so that a conviction will not be reversed on the facts unless it is shown by the Defendant that the evidence preponderates against the verdict and in favor of his innocence. **McBée v. State**, 213 Tenn. 15, 372 S. W. 2d 173 (1963); **Schweizer v. State**, 217 Tenn. 569, 399 S. W. 2d 743 (1966); **Pryor v. State**, 217 Tenn. 695, 400 S. W. 2d 700 (1966).

In addition to suggesting his innocence, the petitioner contends that the late General Porter took advantage of

the petitioner's concern for his son by insisting that both the petitioner and his son plead guilty. The respondent submits General Porter clearly explained his reasons for accepting the compromise proposed by the petitioner's attorney in his statement to the jury (R. 28, 34-36). A mere perusal of the reasons given by General Porter clearly indicates that they are only valid and logical if the State does not have to try either defendant. It just does not make sense for the State to accept a compromise for the petitioner's son, while being compelled to try the petitioner upon the same evidence.

CONCLUSION

As the Petition presents no question which merits this Court's review upon a writ of certiorari, the respondent respectfully submits that this Petition for a writ of certiorari be denied.

Respectfully submitted

THOMAS E. FOX
Deputy Attorney General
State of Tennessee

LANCE D. EVANS
Assistant Attorney General
State of Tennessee
Attorneys for Respondent

Certificate of Service

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of

March, 1970, I served a copy of the within Brief in Opposition to the Petition for Writ of Certiorari on Fred W. Burdette, Sr., Petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to counsel of record, Lawrence J. Bernard, Jr., Esquire, Pierson, Ball & Dowd, 1000 Ring Building, Washington, D. C. 20036.

Thomas E. Fox
Deputy Attorney General
State of Tennessee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,

Petitioner

v.

STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Respondent has opposed the Petition for a Writ of Certiorari on three separate grounds; viz., that the federal question was not properly presented to the Courts below; that the decision of this Court in *Boykin v. Alabama*, 395 U.S. 238 (1969) should not be applied retroactively, and that the procedures employed by the trial court were adequate for a determination that petitioner's plea of guilty was voluntar-

ily and understandingly entered. This reply will deal briefly with each of these arguments in the order in which they were raised.

I. The Underlying Principles Which Support Petitioner's Request for Relief in this Court were Raised by Petitioner's Motion for a New Trial filed in the Trial Court

Respondent's argument that the federal issues presented to this Court by Petitioner were not properly presented to the lower courts is founded upon an overly narrow view of the factual basis for the constitutional issues raised in the petition. It is obvious that since *Boykin v. Alabama,* 395 U.S. 238, was not decided until June 2, 1969, some three weeks after petitioner's final pleading was filed in the Tennessee Supreme Court, he cannot be denied relief in this Court for failing to cite *Boykin* to the Tennessee Courts. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 143 (1967). The substantive question presented by the petition is not whether the trial court was required to exercise the extraordinary foresight necessary to apply the procedural requirements of *Boykin* to the instant case, but, whether, under the circumstances, petitioner's plea of guilty can be assumed to have been voluntarily and knowingly entered. If an examination of all of the circumstances surrounding the plea does not assure the Court that the plea was entered voluntarily, petitioner must be granted leave to withdraw it, for our Courts have long been "careful that a plea of guilty shall not be accepted unless made voluntarily . . ." *Kercheval v. United States,* 274 U.S. 220, 223 (1927).

Thus, a determination of whether or not the federal question was properly raised must be analyzed in terms of petitioner's assertions below that his plea was not voluntary but was the result of coercion arising out of a desire to protect his son and the prosecution's insistence that the son would be treated lightly only if petitioner also plead guilty. As respondent points out in its Brief in Opposition, petition-

er's sixth assignment of error in his Motion for a New Trial, filed with the trial court, is as follows:

> "6. The defendant entered a plea of guilty in order to obtain a smaller sentence for his son notwithstanding the fact that he was not guilty of any intentional wrongdoing."

At the hearing on the Motion for a New Trial,[1] counsel for petitioner argued that at the time petitioner decided to enter his plea "his son stood to be convicted for twenty-one years in the penitentiary" . . .and "[t]his man in an effort to reduce his son's sentence entered his [own] plea." (Arg. 4.) The trial judge obviously understood the basis for petitioner's claim of coercion because he asked a question regarding the circumstances of the plea bargain and counsel for the state quite candidly admitted that the state would not have allowed petitioner's son to plead to a lesser offense and receive a smaller sentence if petitioner had not also agreed to plead guilty. (Arg. 12.)[2]

In appealing the denial of his Motion for a New Trial to the Tennessee Court of Criminal Appeals and from that Court to the Supreme Court of Tennessee, petitioner repeated the sixth assignment of error from his Motion for

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[1] Petitioner was not obliged to raise these questions at the time he entered his plea since he wished to have his plea accepted at that time in order to aid his son and thus could be expected to "cover-up" any constitutional infirmities. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

[2] Respondent's objection that the transcript of the argument "was never even offered for filing, much less filed in any Court in the State of Tennessee" is not well founded. The admissions of counsel for the state relied upon in this Court *were addressed to the trial court* in answer to a question from the bench. (Arg. 11-12). Thus, the trial court had the full benefit of these admissions and had every opportunity to act accordingly. The Court's question and the admission were quoted *verbatim in every major pleading filed by petitioner in both of the Tennessee appellate courts.* Thus, there is no basis for respondent's claim that this "evidence" was not presented to the Tennessee Courts. *Cf. Lear, Inc. v. Adkins*, 395 U.S. 653, 657, footnote 1 (1969)

a New Trial and quoted verbatim the trial judge's question and the prosecutor's answer from pages 11 and 12 of the transcript of oral argument held on the new trial motion in every pleading[3] directed to the merits of his cause. It may be that the quote contained in respondent's brief from petitioner's "Petition to Rehear Petition for Certiorari" filed in the Supreme Court of Tennessee on May 13, 1969 is a somewhat more artfully phrased statement of petitioner's argument, but the legal and factual basis for the relief were also clearly contained in prior pleadings.

In ruling on the adequacy of a litigant's efforts to raise a federal issue in the lower courts, this Court has declined to force litigants to adopt an "arid ritual of meaningless form"[4] and, instead, has ruled that an effort which

> "is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests and therefore sufficient to preserve the claim for review here." *Douglas v. Alabama,* 380 U.S. 415, 422 (1965).

Viewed in the light of this standard, respondent's arguments that the federal question was inadequately raised below is without merit and should not bar review by this Court of the substantial and timely questions raised by the treatment petitioner has received from the Courts of Tennessee.

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[3] "Petition for Certiorari and Supersedeas" and "Statement of the Case, Assignments of Error" filed March 27 and April 24, 1968, respectively, in the Tennessee Court of Criminal Appeals; and "Certiorari and Supersedeas Petition, Assignment of Errors and Brief" filed March 12, 1969 in the Supreme Court of Tennessee.

[4] *Staub v. City of Baxley,* 355 U.S. 313, 320 (1958); quoted in *Henry v. Mississippi,* 379 U.S. 449, 568 (1965).

II. The Petition Should be Granted in Order to Provide the Court With an Opportunity to Decide Whether *Boykin v. Alabama* Should be Applied Retroactively

As respondent points out in Part II of its argument, the petitioner has requested this Court to apply retroactively the rationale of *Boykin v. Alabama,* 395 U.S. 238 (1969) to the facts in the instant case. Although, as set forth below, the instant case involves a fact situation which raises constitutional questions clearly decided prior to the release of *Boykin,* the issuance of the writ prayed for would provide this Court with an opportunity to consider on the merits the question of whether *Boykin* should be decided retroactively.

This Court has ruled that retroactivity can only be determined "in each case 'by looking to the peculiar traits of the specific rule in question'." *Johnson v. State of New Jersey,* 384 U.S. 719, 728 (1966), quoting from *Linkletter v. Walker,* 381 U.S. 618, 629 (1965) and *Tehan v. United States, ex rel Shott,* 382 U.S. 406, 410 (1966). Detailed criteria for determining the retroactivity of newly announced constitutional principles were set forth in *Stovall v. Denno,* 388 U.S. 293 (1967). The weighing of these criteria can only be accomplished through careful scrutiny after full briefing and argument. To date, a number of courts have ruled that the procedural rules announced in *Boykin* should not be applied retroactively.[5] However, several other Courts have cited *Boykin* and applied its rationale in permitting defendants to withdraw guilty pleas without discussing the question of retroactive application. See *United States v. Lucia,* Nos. 26316-7, U.S. App. 5th

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[5] *Illinois v. Williams,* Supreme Court of Illinois, No. 42045, released January 28, 1970; *Arizona v. Griswold,* 147 P.2d 331 (S. Ct. of Arizona); *Bishop v. Langlois,* 256 A.2d 20 (S. Ct. of Rhode Island); *United States ex rel Hughes v. Rundle,* 419 F.2d 116 (3d Cir., 1969); *Commonwealth v. Godfrey,* 254 A.2d 923 (S. Ct. of Pa., 1969); *Montayne v. State,* 256 A.2d 706 (Ct. Spec. Crim. App. of Md., 1969); *Jenkins v. United States,* U.S. Ct. of App. for the Tenth Cir., released January 2, 1970; *In re Tahl,* 460 P.2d 449 (St. Ct. of Cal., 1969).

Cir., released September 17, 1969; *State v. Sisco,* 169 N.W.2d 542 (S. Ct. of Iowa, 1969); *Phillips v. Smith,* 300 F. Supp. 130 (D.C.S.D. Ga., 1969). There is also an apparent conflict concerning the constitutional requirements which governed the acceptance of guilty pleas prior to *Boykin.* See detailed discussion of the problem in *Commonwealth v. McBride,* S. Ct. of Pa., No. 415, released January 30, 1970, and *In re Tahl,* 460 P.2d 449 (S. Ct. of Cal., 1969). Under these circumstances, the Court should grant the petition in the instant case in order to consider and resolve the conflicting questions which have arisen from the differing interpretations of *Boykin* by various state and federal courts.

III. Respondent's Arguments that the Procedures Employed by the Trial Court were Adequate to Protect Petitioner's Constitutional Rights Reflect the Current Confusion over the Constitutionality of the Process of Plea Bargaining

In Part III of its Argument, Respondent suggests that the procedures adopted by the trial court were regular on their face and that the explanations given to the Court by petitioner's attorney and the prosecutor somehow relived the Court of its duty to determine the voluntariness of petitioner's plea. Constitutional principles enunciated prior to *Boykin* clearly required a full inquiry into the facts surrounding the plea bargain when the unusual nature of the mutually contingent pleas became obvious. The Supreme Court of Pennsylvania recently discussed the *pre-Boykin* requirements for accepting a guilty plea in *Commonwealth v. McBride,* where it stated.[6]

> ". . . while *Boykin's* remedy is a new one, and will not be retroactively applied, there is nothing new about *Boykin's* conception of waiver, based as it is on the 1938 decision of *Johnson v. Zerbst, supra.* The definite implication of *Halliday,*

[6]No. 415 January Term, 1969, filed January 30, 1970. The quote was taken from pages 4 and 5 of a typewritten advance opinion.

combined with the emphasis on the *Johnson v. Zerbst* waiver standard in *McCarthy* and *Boykin*, is that to satisfy due process in pre-*Boykin* silent record cases, the government must carry the burden of demonstrating a knowing and intelligent guilty plea.

"Indeed this is where the burden had been placed by all federal circuits which had considered the matter, even before *McCarthy* and *Boykin*. In particular, the Third Circuit has held that in silent record cases the Commonwealth has the burden of proving voluntariness: '[I]t should be pointed out that the strong presumption of constitutional regularity which attaches to a State court conviction when collaterally attacked, may be overcome where there is no record of the state court proceedings [at the time the plea was accepted] or where such a record does exist, but shows that the trial court did not properly question the defendant on accepting his plea.' Relying on *Kercheval v. United States*, the court then concluded that 'the Commonwealth had the burden of proving that appellant's guilty pleas were voluntary.' *United States ex rel McCloud v. Rundle*, 402 F.2d 853, 857, 858 (3d Cir. 1968)." (Footnotes omitted.)

Thus, in the instant case, the burden was on the State to show that petitioner's plea was voluntary, and, since the State declined to assume this burden at the hearing on the Motion for a New Trial, petitioner should have been permitted to withdraw his plea of guilty.

Although the potentially coercive elements of the bargain were quite obviously present in the instant case, the great majority of guilty pleas result from bargains which are never closely examined on the record by a judicial officer. As pointed out in the petition in the instant case, confusion surrounds the question of what procedural safeguards, if any, are necessary to assure the constitutional rights of a defendant who enters into a bargain with the

prosecutor for a lesser charge or sentence than he might be expected to obtain if found guilty after a trial. The summary procedures employed by the Courts below, both in accepting petitioner's guilty plea and in reviewing the plea on appeal are evidence of this confusion. Respondent's reliance upon the statements of the prosecutor and petitioner's counsel at the time the plea was entered further point up the lack of understanding which surrounds the need to closely examine bargained pleas of guilty. It is precisely because petitioner, his counsel and the prosecutor all desired to have the plea accepted that the trial judge as the only disinterested party to the proceeding should have conducted an independent inquiry into the background of the bargain.

This Court's recent decisions in *Boykin*, *McCarthy v. United States*, 394 U.S. 459 (1969) and *Jackson v. United States*, 390 U.S. 570 (1968) have stimulated a discussion of the procedures necessary to protect defendants who plead pursuant to bargains made with the prosecution. In concurring with a majority decision holding that *Boykin* should not be applied retroactively, Justice Peters of the California Supreme Court indicated in *In re Tahl*, 460 P.2d 499, ___, (1969):

> "[T]hat the realities of criminal justice demand a more basic reform of plea procedures than that undertaken by the majority if we are to serve the laudable objectives of *Boykin*. A trial judge cannot meaningfully assess the voluntariness of a guilty plea, and the record of plea proceedings cannot fairly preclude a claim of the plea's invalidity, as long as defendants are expected to hide the most common motivation for such pleas: plea bargains. I would require that all plea bargains be set forth on the record and that defendants be fully advised of the possible consequences of the bargain they have entered."

Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit, discussed the

matter at some length in his opinions in *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969),[7] and *Prettyjohn, v. United States*, U.S. App. D.C. No. 21666, November 17, 1969.[8] In *Scott*, Judge Bazelon said: "the difficulties that practice [plea bargaining] presents are exceeded only by its pervasiveness" (419 F.2d at 271). In *Prettyjohn*, he concluded that a request for an *en banc* hearing should have been granted for the purpose of considering the "difficult but important questions concerning the standards to be used by the District Courts in accepting or rejecting bargained pleas of guilty" (Slip Opinion, p. 2). He argued that:

> "If plea bargaining is constitutional, it should not go unsupervised. Yet the present state of the law places even the most conscientious trial judge in a difficult position. * * * The problem is that by remaining silent on the constitutionality of plea bargaining, we do not provide any indication that further inquiry might have validated the plea. If we are to uphold bargained pleas, I think we must also delineate the power and the duty of trial courts, faced with a situation such as the present one, to conduct a further inquiry." (Slip Opinion, pp. 6-7, footnotes omitted.)

Since the record in the instant case contains a fact situation in which the key considerations leading to a plea bargain are clearly set forth, the issuance of a writ of certiorari would give the Court an appropriate vehicle for examining and deciding the important constitutional questions presented by the plea bargaining processes which are so common in criminal trial courts throughout the United States.

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[7] Although concurring in the result reached, the two other judges on the *Scott* panel filed separate opinions. See 419 F.2d at 279 and 281.

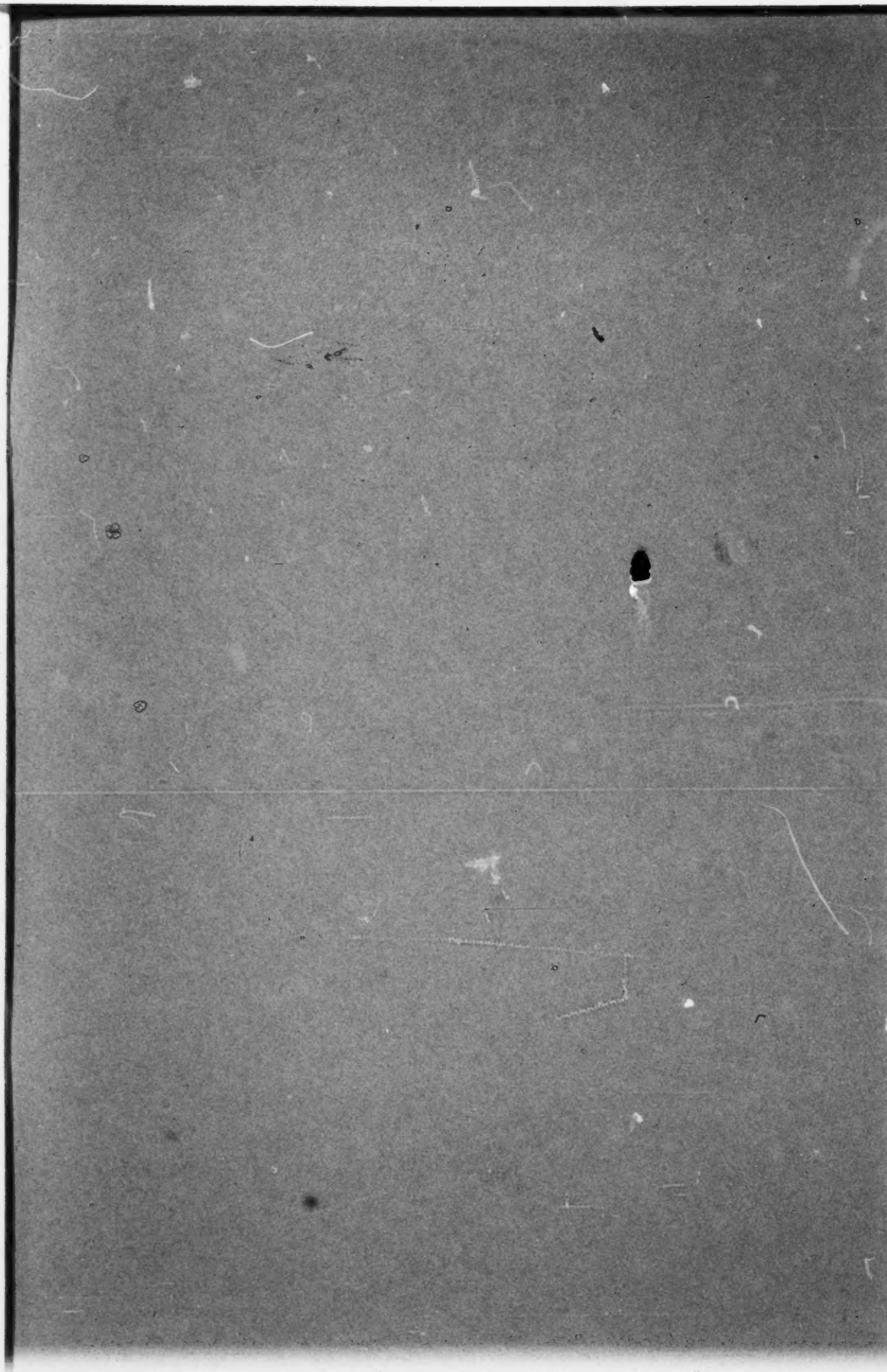
[8] Chief Judge Bazelon's opinion was a statement of his reasons for voting for rehearing *en banc* in a case where the other members of the Court had denied a request for rehearing *en banc* in a per curiam order.

CONCLUSION

For the reasons set forth above the Petition for a Writ of Certiorari should be granted.

Respectively submitted,

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IN THE

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OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
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v.

STATE OF TENNESSEE,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Fred W. Burdette, Sr. prays that this Court grant rehearing of its order of March 23, 1970, denying his petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee in the above-entitled cause as prayed for in his petition filed November 1, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This Court's decisions in *McCarthy v. United States*, 394 U.S. 459 (1969) and *Boykin v. Alabama*, 395 U.S. 238 (1969) construing generally the procedures required to protect criminal defendants who enter guilty pleas, have stimulated several lower court judges to discuss the particular procedures necessary to protect those defendants who plead guilty pursuant to an agreement or "plea bargain" with the prosecution. Opinions of Justice Peters of the California Supreme Court[1] and Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit[2] were quoted from on pages 8 and 9 of petitioner's "Reply to Brief in Opposition" filed in this Court on March 16, 1970 and will not be repeated herein.

However, subsequent to the filing of petitioner's reply, the American Bar Association's Project on Standards for Criminal Justice published its *Standards Relating to the Prosecution Function and the Defense Function*. In this latest document in a series of publications on standards relating to criminal justice, the project attempts once again to wrestle with the problems surrounding the acceptance of guilty pleas entered pursuant to a bargain with the prosecution. In its earlier publication dealing with the *Standards Relating to Pleas of Guilty*, the project stated as follows on pages 63-64:

> "Current bargaining practices have not often been the subject of appellate review and consequently the important issues have not received adequate attention from appellate courts. Language in the reported cases asserting that pleas obtained in exchange for promises are not voluntary is not uncommon, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962).

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[1] *In re Tahl*, 460 P.2d 499 (1969), concurring opinion.

[2] *Scott v. United States*, 419 F.2d 264 (1969) and *Prettyjohn v. United States*, U.S. App. D.C. No. 21666, November 17, 1969, dissenting opinion.

> These cases however, 'have stated the rule in dicta or in holdings that did not extend to situations in which the promises were in fact fulfilled', Note 36 Texas L.Rev. 97, 97 (1957)".

Not since *Shelton v. United States*, 356 U.S. 26 (1958), has this Court accepted a case for the purpose of deciding a question concerning the practice of plea bargaining. In *Shelton*, the confession of error by the Solicitor General and the subsequent reversal of the Fifth Circuit's decision in a memorandum decision without opinion only added to the confusion already surrounding plea bargaining.

In the resulting vacuum it is not surprising, in view of the fact that "something on the order of 90 per cent"[3] of criminal trials are disposed of by pleas of guilty, that there have been attempts to justify the process of plea bargaining and to devise standards to regulate it. Citing its own study on *Pleas of Guilty*, the ABA's Project on Standards for Criminal Justice, has stated that "The propriety of plea discussions and plea agreements now has been given explicit recognition".[4] The rationale for this favorable recognition is explained in the following statement:

> "[A] plea agreement may serve the public interest because it increases the promptness and certainty of the application of correctional measures, because by his plea the defendant acknowledges his guilt and, hopefully, shows a willingness to accept responsibility for his conduct, because the plea may permit a more appropriate sanction, because the plea obviates the need for a costly and time-consuming trial, and, in some cases, because the defendant has cooperated in the prosecution of other offenders. (Id. at 243-244).

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[3] *ABA Standards, The Defense Function*, 244.

[4] *Id.* at 243.

All of the above may be true, but it is also true that bargaining between a man facing the possibility of a long jail sentence and a prosecutor can be unequal and even coercive in many instances. As the original panel of Fifth Circuit Judges in *Shelton* stated, "Justice and liberty are not the subject of bargaining and barter".[5] In the instant case where a father's concern for his son's welfare was obviously present, justice demands greater inquiry than the perfunctory questioning carried out by the trial judge. (See Petition, pp. 5-7.)

The propriety of the prosecution offering to Petitioner and proposing to the court a potentially coercive plea in return for lenient treatment of petitioner's son has been a central issue throughout the litigation of this matter in the lower courts. Thus, in Petitioner's "Motion for a New Trial" filed with the trial court on March 14, 1968, Petitioner alleged that he had "entered a plea of guilty in order to obtain a smaller sentence for his son, notwithstanding the fact that he was not guilty of any intentional wrongdoing". (See Petition, pp. 6-9.) These allegations were repeated in every pleading addressed to the merits of Petitioner's case filed in the Tennessee courts. Thus, the question concerning the propriety of the prosecution's role in the bargain leading to Petitioner's plea of guilty was adequately raised below.

The instant case presents the Court with a record on which important questions too long left undecided may be considered. That these questions are increasingly important is demonstrated by the careful study the ABA's Project on Standards for Criminal Justice has given the matter, and that organization's sanctioning of a policy which, in light of this Court's action in *Shelton, supra,* is at least questionable in many of its applications. For this reason, the Court's order of March 23, 1970 should be reconsidered and the Petition for Writ of Certiorari granted.

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[5] *Shelton v. United States,* 242 F.2d 101, 113, rev'd 246 F.2d 571 (1957).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Rehearing of Order Denying Petition for Writ of Certiorari should be granted and a writ of certiorari to the Supreme Court of Tennessee should be issued.

Respectfully submitted,

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Counsel for Petitioner

April 13, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

SUPPLEMENTAL MEMORANDUM TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Pursuant to Section 24(5)[1] of the Rules of this Court, Fred W. Burdette, Sr. hereby supplements his Petition for Rehearing of Order Denying Petition for Writ of Certiorari filed in this proceeding on April 13, 1970.

The purpose of this supplemental memorandum is to call the Court's attention to a Note in the April 1970 Harvard Law Review titled *The Unconstitutionality of Plea Bargain-*

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[1] If this rule is construed by the Court to not apply to Petitions for Rehearing, Petitioner respectfully requests leave of the Court to file this Supplemental Memorandum.

ing, 83 Harv. L. Rev. 1387. This Note was not available to counsel until April 21, 1970 when the regular subscription copy of the Harvard Law Review was delivered by mail.

The instant case involves a situation where a father (petitioner) and son were jointly indicted for assault with intent to have carnal knowledge and with assault with intent to commit murder.[2] Conviction on each of these charges is punishable under Tennessee law by a sentence of not less than 10 nor more than 21 years in the penitentiary. As the result of a bargain agreed to by petitioner, his son, and the prosecution, petitioner pled guilty to assault with intent to commit a felony[3] and received an agreed upon sentence of 11 months and 29 days in jail, and his son pled guilty to assault with intent to commit murder and received the agreed upon minimum sentence of ten years in the penitentiary. (See Petition, pp. 3-4, R.4, 27-28, 36).

In the Petition for Rehearing, petitioner attempted to demonstrate that recent decisions of this Court determining the procedures to be followed in order to guarantee the Constitutional rights of defendants who enter pleas of guilty to criminal charges,[4] have left open the questions surrounding guilty pleas entered pursuant to a bargain with the prosecution, and thus have stimulated discussion of these questions in lower courts and by the American Bar Association's Project on Standards for Criminal Justice.[5] The ABA project has specifically approved the practice of plea bargaining and has set up standards to govern the acceptance of pleas entered pursuant to a bargain.[6]

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[2]Tennessee Code Annotated Sections 39-605 and 39-604.

[3]Tennessee Code Annotated, Section 39-603.

[4]*McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

[5]See *Standards Relating to Pleas of Guilty* (adopted, as amended, 2 Crim.L.Rep. 2422 1968) and *Standards Relating to the Prosecution Function and the Defense Function* (tentative draft 1970).

[6]*Pleas of Guilty, supra* at pp. 10, 60; *The Defense Function, supra* at p. 243.

In the law review Note cited above the author criticizes the conclusions of the ABA's project and, citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevack v. Klein*, 385 U.S. 511 (1967) argues hat:

> plea bargaining should be held unconstitutional because it places the accused in the dilemma of having to forfeit either his privilege against self-incrimination (by acknowledging his guilt through a plea of guilty) or his chance for a shorter sentence or reduced charge. Only if the state is willing to forgo the criminal prosecution can it require the individual to speak or suffer a penalty. But since the very purpose of plea bargaining is to prosecute and convict the defendant by pressuring him to plead guilty, the practice will always violate the fifth amendment. The additional penalty imposed by plea bargaining on the exercise of sixth amendment rights makes the case against the practice even stronger. (83 Harv. L. Rev. at 1400)

In the instant case, the record indicates that the coercive nature of the bargain offered petitioner was even greater than the usual situation criticized in the Note. Thus, petitioner was faced not only with the choice of either waving the several constitutional rights[7] involved in his own trial or losing his chance for significantly shorter sentence, but, in addition, if he had not waived his trial rights, he would have been unable to secure a minimum sentence for his son. (See Petition, p. 9, Arg. 11-12) For this reason, this case presents the Court with an excellent opportunity to examine and decide constitutional questions of grave importance to the administration of criminal justice in all of the courts of this country.

In light of the arguments set forth above and in the Petition for Rehearing of Order Denying Petition for Writ of Certiorari, this Court is respectfully requested

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[7] *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

to issue a writ of certiorari to the Supreme Court of Tennessee.

Respectfully submitted,

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April 23, 1970

